

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 26, 2004

Case No.: TIA-0178

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

B. Procedural Background

The Worker was employed as a chemical operator at the DOE's Oak Ridge site (the site) for approximately thirty-four years. The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA. The DOL issued a positive Subpart B decision on colon cancer. The OWA referred the Applicant's Subpart D application to the Physician Panel for consideration of colon cancer, rectal polyps, stomach ulcers, chronic obstructive pulmonary disease (COPD)-granulomatous, lipoma in the right arm, thyroid enlargement, testicular disorder, stroke, and heart disease.

The Physician Panel rendered a negative determination for each of the claimed illnesses. The Panel found that there was no evidence in the record to establish a diagnosis of stomach ulcers or COPD-granulomatous. With respect to the other illnesses, the Panel agreed that the Worker had the conditions, but found insufficient evidence to conclude that they were related to workplace exposures. The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

On appeal, the Applicant does not challenge the Panel's determination concerning stomach ulcers. Instead, she

challenges the Panel's determinations on the other illnesses. The Applicant maintains that the Worker was exposed to toxic substances. She questions why "there were no badge readings included in the information that was reviewed by the physician panel."¹ She asserts that in the course of his duties, the Worker was exposed to "epoxy resins, amines, and carcinogenic materials."² She also relates two different incidents, which she contends demonstrate the relationship between workplace exposures and the Worker's illnesses. At some point after 1954, the Worker talked about a "spill at the plant" and said that "he had to scrub down to remove the chemicals from his body."³ He also consulted a cancer doctor following an incident where he "hemorrhaged from his rectum while at work."⁴

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding.⁵ The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The overall thrust of the Applicant's arguments is that the Applicant had exposures that were not considered. To the extent that these general arguments apply to the colon cancer determination, the arguments are moot, since the Applicant's Subpart B positive determination on colon cancer satisfies the Subpart E requirement of a nexus between toxic exposures at DOE and an illness. Authorization Act § 3675(a). Moreover, as explained below, the Applicant's arguments do not indicate error on the other illnesses.

The Applicant's argument that the Physician Panel did not have the opportunity to review dosimetry records does not demonstrate error. The record indicates that the OWA requested exposure records, incident-accident records, personnel records,

¹ Applicant's Appeal Letter, dated August 24, 2004.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 10 C.F.R. § 852.12.

industrial hygiene reports, and radcon records.⁶ There is no reason to believe that the site did not provide all available information.

The Applicant's argument that the Worker was exposed to certain hazardous materials in the workplace also does not indicate Panel error. The Panel clearly acknowledged the Worker's exposure to those substances. The Panel stated that as a chemical operator, the Worker was "involved in the 'physical and chemical processing of enriched uranium and worked around toxic materials in the lab area.'" ⁷ The Panel noted that the Worker was potentially exposed to "radiation, uranium hexafluoride, hydrogen fluoride, fluorine, asbestos, acids, solvents, mercury, nickel, and bases" as well as "epoxy resins, nickel carbonyl, technetium-99, transuranics, and uranium."⁸ However, the Panel ultimately concluded that the illnesses were not related to exposure to these substances.

Finally, the Applicant's argument that the Panel should have discussed two incidents does not indicate Panel error. As mentioned above, the Panel found that the Worker was exposed to toxic materials. The Panel's failure to mention the cited incidents in the report does not diminish its clear acknowledgement of toxic exposures.

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0178 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

⁶ See Record, History of Charles Whaley sheet.

⁷ Panel Report, at 1.

⁸ *Id.*

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005